LIM SZE ON & ORS

v.

SYARIKAT GUNUNG SEJAHTERA SDN BHD

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
HASHIM YUSOFF FCJ
ZULKEFLI MAKINUDIN FCJ
[CIVIL APPEAL NO: 02 (i)-14-2008 (A)]
9 JUNE 2009

LAND LAW: *Housing developers - "Housing development", meaning of - Whether respondent a "developer" within meaning of s. 3 Housing Development (Control & Licensing) Act 1966 - Respondent not proprietor/vendor of building lots - Respondent holding out as "housing developer"- Court not empowered to declare respondent as 'licensed housing developer' - Licence can only be granted by Controller of Housing - Whether terms and conditions in form prescribed in Schedule G in s. 11 Housing Developers (Control & Licensing) Regulations 1989 should apply instead of terms and conditions in agreements entered into between appellant and respondents*

CONTRACT: *Housing development contract - "Housing development", meaning of - Whether respondent a "developer" within meaning of s. 3 Housing Development (Control & Licensing) Act 1966 - Respondent not proprietor/vendor of building lots - Respondent holding out as "housing developer"- Court not empowered to declare respondent as 'licensed housing developer' - Licence can only be granted by Controller of Housing - Whether terms and conditions in form prescribed in Schedule G in s. 11 Housing Developers (Control & Licensing) Regulations 1989 should apply instead of terms and conditions in agreements entered into between appellant and respondents*

The defendant/respondent had advertised itself as a housing developer of a housing project called Desa Sri Ampang Ipoh ('the project'). All fourteen plaintiffs/appellants were the purchasers of houses built by the defendant in the project. The plaintiffs had entered into two agreements with the defendant. Under the first agreement, the plaintiffs agreed to pay the costs of the development works carried out by the defendant. Under the second agreement, the defendant agreed to build the houses for

A the plaintiffs within two years from the date the agreement. Clause 13 of the second agreement provided for damages of RM50 per month to be paid by the defendant in the event of delay in handing over vacant possession of the completed houses. There was late delivery of the houses. The issue that arose was whether B the agreements entered into were in contravention of the Housing Developers (Control and Licensing Act 1966 (Act 118) ('the Act') and the Housing Developers (Control and Licensing) Regulations 1989 ('the Regulations') and whether damages for late delivery should be made subject to cl. 22(2) of Schedule G of the C Regulations which provides for liquidated damages at the rate of 10% per annum of the purchase price. The learned High Court Judge found that the defendant was a housing developer and held that the agreements should have been made according to Schedule G of the Regulations. As such, the plaintiffs were held to be D entitled to claim liquidated damages for late delivery using the formula in the Regulations. The Court of Appeal reversed the findings of the High Court. The plaintiffs appealed to the Federal Court on the following questions of law: (i) Whether a contractor who carries out a building operation to erect houses on any land E in a Kampung Tersusun Scheme falls within the definition of Housing Developer under s. 3 of the Act; and (ii) If so, whether the terms of the contracts entered into between the parties here should be replaced *mutatis mutandis* with the agreement under Schedule G of the Regulations.

F

Held

Per Zulkefli Makinudin FCJ dismissing the appeal with cost:

(1) The Act and the Regulations did not apply to the facts and the circumstances of this case. It was the plaintiffs who G applied for the building lots from the Land Office, Ipoh. Form 5A under the National Land Code 1965 was issued to the plaintiffs by the Land Office. The document of qualified titles relating to the building lots were issued to the plaintiffs. These facts showed that the building lots which were originally State H land were alienated to the respective plaintiffs. The defendant therefore was clearly not the proprietor/vendor of the building lots. (paras 19, 20, 22 & 23)

I

(2) There was nothing to show that the defendant was a 'licensed housing developer' within the meaning of s. 3 of the Act. The court is not empowered to grant such a declaration as sought for by the plaintiffs. Section 5 of the Act provides no housing development may be undertaken except by a housing developer in possession of a licence issued under the Act. Such a licence can only be granted by the Controller of Housing as provided for under the Act and not by way of a declaration by the court. To grant such a declaration would tantamount to the court usurping the powers of the Controller of Housing under the Act. The fact that the defendant held itself out as a "housing developer" through advertisements had no bearing upon the declaration sought for. (paras 26 & 27)

(3) Both questions posed were therefore answered in the negative. (para 33)

Bahasa Malaysia *Translation Of Headnotes*

Defendan/responden telah mengiklankan dirinya sebagai pembangun perumahan sesuatu projek perumahan yang dipanggil Desa Sri Ampang Ipoh ('projek'). Kesemua 14 plaintif/perayu ialah pembeli rumah-rumah yang dibina oleh defendan dalam projek. Plaintif telah membuat dua perjanjian dengan defendan. Di bawah perjanjian pertama, plaintif telah setuju membayar kos-kos kerja-kerja pembangunan yang dibuat oleh defendan. Di bawah perjanjian kedua, defendan telah setuju membina rumah-rumah untuk plaintif dalam jangka masa dua tahun dari tarikh perjanjian. Klausa 13 perjanjian kedua menyediakan untuk ganti rugi sebanyak RM50 sebulan untuk dibayar kepada defendan jika ada kelewatan dalam penyerahan milikan kosong rumah-rumah yang siap. Terdapat kelewatan dalam penyerahan rumah-rumah. Isu yang bangkit ialah sama ada perjanjian-perjanjian yang dibuat melanggar Akta Pembangun Perumahan (Kawalan dan Pelesenan) 1966 (Akta 118) ('Akta') dan Peraturan-peraturan Pembangun Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan') dan sama ada ganti rugi bagi penyerahan lewat sepatutnya tertakluk kepada kl. 22(2) Jadual G Peraturan yang menyediakan untuk ganti rugi jumlah tertentu pada kadar 10% setahun dari harga belian. Yang arif Hakim Mahkamah Tinggi mendapati bahawa defendan ialah suatu pembangun perumahan dan memutuskan bahawa perjanjian-perjanjian sepatutnya dibuat mengikuti Jadual G Peraturan. Oleh yang

A demikian, plaintif telah didapati berhak untuk menuntut ganti rugi jumlah tertentu bagi penyerahan lewat dengan menggunakan formula dalam Peraturan. Mahkamah Rayuan menterbalikkan dapatan Mahkamah Tinggi. Plaintif merayu ke Mahkamah Persekutuan atas soalan-soalan undang-undang yang berikut: (i) B Sama ada suatu kontraktor yang menjalankan suatu operasi pembangunan untuk membina rumah-rumah atas mana-mana tanah dalam sesuatu Skema Kampung Tersusun terangkum dalam definasi Pembangun Perumahan di bawah s. 3 Akta; dan (ii) jika sebegitu, sama ada terma-terma kontrak-kontrak yang dibuat di antara pihak- C pihak seharusnya digantikan *mutatis mutandis* dengan perjanjian di bawah Jadual G Peraturan.

Diputuskan
Oleh Zulkefli Makinudin HMP menolak rayuan dengan kos:

D
(1) Akta dan Peraturan tidak terpakai kepada fakta-fakta dan halkeadaan kes ini. Ia merupakan plaintif yang telah memohon untuk lot-lot bangunan dari Pejabat Tanah, Ipoh. Borang 5A di bawah Kanun Tanah Negara telah dikeluarkan kepada plaintif oleh Pejabat Tanah. Dokumen hakmilik sementara E berhubungan dengan lot-lot bangunan telah dikeluarkan kepada plaintif. Fakta-fakta ini menunjukkan bahawa lot-lot bangunan yang pada asalnya tanah Kerajaan telah berimilik kepada plaintif masing-masing. Defendan, oleh itu, jelas bukan tuan punya/penjual lot-lot bangunan. F

(2) Tiada apa-apa untuk menunjukkan bahawa defendan ialah sesuatu "pembangun perumahan yang berlesen" seperti yang dimaksudkan dalam s. 3 Akta. Mahkamah tidak mempunyai kuasa untuk memberi deklarasi seperti yang dituntut oleh G plaintif. Seksyen 5 Akta menyediakan bahawa tidak ada apa-apa pembangunan perumahan boleh dijalankan kecuali oleh sesuatu pembangun perumahan yang memiliki satu lesen yang dikeluarkan di bawah Akta. Lesen sebegitu hanya boleh diberi oleh Pengawal Perumahan seperti yang disediakan di bawah H Akta dan bukan melalui suatu deklarasi oleh mahkamah. Untuk membenarkan suatu deklarasi macam itu seumpama dengan mahkamah merampas kuasa-kuasa Pengawal Perumahan di bawah Akta. Fakta bahawa defendan telah mengatakan dirinya sebagai suatu "pembangun perumahan" melalui iklan-iklan tidak I ada apa-apa kaitan dengan deklarasi yang dituntut.

(3) Kedua-dua soalan yang dikemukakan oleh itu dijawab secara negatif.

Case(s) referred to:

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Berhad [1985] 1 MLJ 285 ***(refd)***

Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors [2001] 3 CLJ 864 CA ***(refd)***

MK Retnam Holdings Sdn Bhd v. Bhagat Singh [1985] 2 MLJ 212 ***(refd)***

SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

Legislation referred to:

Housing Developers (Control and Licensing) Act 1966, ss. 3, 5, 6, 18

Housing Developers (Control and Licensing) Regulations 1989, reg. 2, 11(1), Schedule G

National Land Code, ss. 81, 82

For the appellants - Chan Kok Keong (Norazali Nordin with him); M/s Ngeh & Co

For the respondent - Choy Kam Lee; M/s KL Choy & Co

[Appeal from Court of Appeal, Civil Appeal No: A-02-256-02]

Reported by Amutha Suppayah

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] This is an appeal by the appellants against the decision of the Court of Appeal dated 7 March 2005 which allowed the respondent's appeal against the decision of the Ipoh High Court Originating Summons No. 24-652-2000. Before the High Court the appellants were the plaintiffs and the respondent was the defendant. We shall refer to the parties as they were in the High Court. The plaintiffs in their originating summons filed against the defendant are seeking for the following reliefs:

1. That the defendant be declared to be a housing developer as defined under s. 3 of the Housing Developers (Control and Licensing Act 1966 (Act 118) ("the Act").

2. That the terms and conditions of the sale and purchase agreements entered into between the plaintiffs and the defendant are *mutatis mutandis* in accordance with the statutory sale and purchase agreement under Schedule G of the Housing Developers (Control and Licensing) Regulations 1989 ("the regulations").

3. That the agreements entered into by both parties be replaced by the statutory agreement under Schedule G of the regulations.

[2] The learned judge of the High Court granted the reliefs sought by the plaintiffs with costs.

[3] On 20 May 2008, the plaintiffs obtained leave to appeal from the Federal Court on the following questions of law:

(1) Whether a contractor who carries out a building operation to erect houses on any land in a Kampung Tersusun Scheme falls within the definition of Housing Developer under s. 3 of the Housing Developers (Control and Licensing) Act 1966.

(2) If so, whether the terms and conditions of the contracts entered into between the contractor and the purchasers should be replaced *mutatis mutandis* with the agreement under Schedule G of the Housing Developers (Control and Licensing) Regulations.

Background Facts

[4] The relevant background facts of the case are as follows:

[5] The defendant through advertisements in the newspapers, brochures and flyers and an advertisement board that it put up, had advertised itself as a housing developer of one housing project called Desa Sri Ampang Ipoh ("the project"). All fourteen plaintiffs are the purchasers of the houses built by the defendant in the project. The said project consisted of one hundred and sixty eight residential houses. The plaintiffs as purchasers entered into separate agreement ("the first agreement") with the defendant in the years 1996 and 1997. Subsequent to the signing of this first agreement, the plaintiffs were required to sign another agreement with the defendant ("the second agreement"). Under the second agreement the plaintiffs as purchasers were termed as Majikan

(employer) and the defendant as the contractor. This peculiar arrangement as it turned out was necessary because the defendant had been given two land lots, ie, Lots 12606 and 65612, Mukim Ulu Kinta, by the State Authority to develop it as a "Rancangan Perkampungan Tersusun" through an assignment from a company known as Saga Lintang Sdn Bhd ("SLSB").

[6] Under the second agreement the defendant had agreed to complete the building of the houses within two years from the date the second agreement was entered into by the parties. Clause 13 of that agreement however stipulates that in the event of any delay to complete and hand over vacant possession of the houses, the defendant need only to pay to the plaintiffs' damages of RM50 per month calculated from date of completion to the date of actual delivery of vacant possession. There was no dispute that there had been late delivery of the houses purchased by the plaintiffs. The issue that arose was whether the agreements entered into by both parties were in contravention of the Act, and that the damages on late delivery should be made subject to cl. 22(2) of Schedule G of the Regulations which provides that liquidated damages in that instance is to be calculated on a daily basis at the rate of 10% per annum of the purchase price.

Findings Of The High Court

[7] The learned judge of the High Court found that the defendant was a "housing developer" by legal definition and held *inter alia* that the agreements should have been made according to the standard sale and purchase agreements pursuant to Schedule G of the Regulations. The learned judge went on to state that the court will not recognize the bargaining away or renouncement of a purchaser's right and an agreement to that effect must be held to be void on grounds of public policy. As such, cl. 13 found in the second agreement must not be allowed to stand and the plaintiffs are entitled to pursue their claims for liquidated damages for late delivery of their houses under the formula provided by the regulations.

Findings Of The Court Of Appeal

[8] The Court of Appeal reversed the findings of the High Court and set aside the orders of the High Court *inter alia* on the following grounds:

(a) That the Act and Regulations cannot apply to the circumstances of the case as the building lots were originally State land alienated to the respective purchasers;

(b) There is nothing to show that the defendant was a "licensed housing developer" within the meaning of s. 3 of the Act;

(c) Schedule G of the Regulations cannot apply to the facts of the case as the defendant never sold any land in the form of building lots to the purchasers.

The Appeal

[9] Learned counsel for the plaintiffs had submitted that the defendant is estopped from denying that they are actually the developer to the said project. He further contended that since the development consisted of building more than four houses, then by definition under s. 3 of the Act the defendant can only be termed as a developer. The defendant is thus bound by the provisions of the Act and could not contract out of it. Learned counsel for the plaintiffs also argued that it is immaterial whether or not the plaintiffs own the land on which the houses are constructed so long as more than four units of houses are erected on any land, and the person or company or body who is paid to do so is defined as a "housing developer".

[10] For the defendant it was argued by learned counsel that the Act does not apply to the defendant as it was not a housing developer within the contemplation of the Act. He pointed out that the defendant was only a contractor and it is the plaintiffs who are the registered owners of the building lots. Further, it was submitted neither the first agreement nor the second agreement mentioned about a sale of land. The defendant also contended that a developer's licence was not required for this project since the development concept was different.

[11] It is necessary at the outset that we set out the following salient facts relating to the case in order for us to determine whether the defendant is in fact a housing developer or not under the provisions of the Act:

(a) the defendant was an assignee of an award by the District and Land Office, Ipoh to a company named Saga Lintang Sdn Bhd to carry out a construction work for a scheme known as "Rancangan Perkampungan Tersusun";

(b) the plaintiffs were selected by the "Jawatankuasa Pemilih Pejabat Daerah dan Tanah Ipoh" to join and to apply for a building lot in the said scheme;

(c) the defendant was responsible to carry out the development works in the said scheme;

(d) upon payment of premium and other fees to the District Land Office, Ipoh the plaintiffs were entitled to building lots in the said scheme; and

(e) two separate agreements were entered into, *viz*, the first agreement and the second agreement between the plaintiffs and the defendant.

[12] It is also necessary that we set out herein the relevant provisions of the Act and the Regulations as follows:

[13] Section 3 of the Act which is an interpretation provision states that a "housing developer" means any company which engages in or carries on or undertakes or causes to be undertaken a housing development. Section 3 of the Act also provides that a "licensed housing developer" means any housing developer licensed under s. 5 to engage in or carry on or undertake a housing development and includes the holder of any power of attorney of such housing developer duly created under the Powers of Attorney Act 1949.

[14] Section 3 of the Act further provides for the definition of "housing accommodation" and "housing developments" as follows:

> 'housing accommodation' includes any building, tenement or messuage which is wholly or principally constructed, adapted or intended for human habitation or partly for human habitation and partly for business premises but does not include an accommodation erected on any land designated for or approved for commercial development.
>
> 'housing development' means to develop or construct or cause to be constructed in any manner more than four units of housing accommodation and includes the collection of monies or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or the sale of more than four units of housing lots by the landowner or his nominee with the view of constructing more than four units of housing accommodation by the said landowner or his nominee.

[15] Section 5 of the Act intituled "Prohibition against housing development except by virtue of a licence and provisions relating to the grant of a licence" reads as follows:

> 5(1) No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act.
>
> (2) Except with the written consent of the Controller no housing developer other than a licensed housing developer shall assume or use in relation to his business or any part of his business the words 'housing developer' or any of its derivatives or any other word or words indicating the carrying on of the business of housing development.
>
> (3) A housing developer who desires to engage in or carry out or undertake or cause to be undertaken a housing development shall apply to the Controller for a licence and any such application shall be made in the prescribed form and in the case of any applicant listed in column (1) of the Schedule the application shall be accompanied by the documents listed against him in column (2), every such document being verified by means of a statutory declaration made by the person listed in column (3) of the said Schedule.
>
> (4) ...
>
> (4A) ...
>
> (4B) ...
>
> (5) ...

[16] Section 18 of the Act intituled "Offences relating to a licence under s. 5" reads as follows:

> 18. Any housing developer who:
>
> (a) in contravention of section 5(1) engages in, carries out, or undertakes housing development without having been duly licensed under that section;
>
> (b) in contravention of section 5(2) assumes or uses in relation to his business the words 'housing developer' or any of the derivatives or any other word or words indicating the carrying on of the business of housing development; or

(c) fails to comply with any of the conditions imposed on the licence granted under section 5;

shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than fifty thousand ringgit but which shall not exceed five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[17] Regulation 2 of the Regulations, an interpretation provision, provides "contract of sale" means the Sale and Purchase Agreement prescribed under Regulation 11. Regulation 11(1) reads as follows:

11(1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

[18] It would also be appropriate here to reproduce part of the form prescribed in Schedule G of the Regulations which is as follows:

Schedule G

Housing Developers
(Control And Licensing) Act 1966

Housing Developers
(Control And Licensing) Regulations 1989

(Regulation 11(1))

Sale And Purchase Agreement
(Land And Building)

AN AGREEMENT made this ... day of ... 19 ... BETWEEN ... a company incorporated in Malaysia and duly licenced under the Housing Developers (Control and Licensing) Act 1966 (Licence No. ...) with its registered office at ... (hereafter called 'the Vendor') of the *one/first part AND ... NRIC No. ... of ... (hereinafter called 'the Purchaser') of the *other/second part AND ... NRIC No. ... of ... (hereafter called 'the Proprietor') of the third part. Preamble.

A WHEREAS the *Proprietor/Vendor is the registered and beneficial owner of land held under ... (description of title) and No. of Title ... *Lot No./LO. No. ... Section ... in the *Town/Village/Mukim ... District of ... State of ... in area measuring approximately ... hectares ... square metres (hereafter referred to as 'the said Land')* and has granted the Vendor the absolute right to develop the said Land as a housing development and to sell the said Land;

*AND WHEREAS the Proprietor hereby agrees to the sale of the said Land for the purpose of this Agreement;

C AND WHEREAS the said Land is charged to ... with its registered office at ... as security for the loan granted to the Vendor;

D AND WHEREAS the Vendor has, at its own costs and expense, obtained the approval of the Appropriate Authority for the subdivision of the said Land into building lots in accordance with the approved Layout Plan a copy of which is annexed as the First Schedule (hereinafter referred to as 'the Layout Plan') and separate documents of title have *since been/not yet been issued by the Appropriate Authority;

E AND WHEREAS the Vendor has, at its own cost and expense, obtained the approval of the building plans (hereinafter referred to as 'the Building Plan') from the Appropriate Authority, a copy of which is annexed as the Second Schedule;

F AND WHEREAS the Vendor is developing the said Land as a housing development known as ... *Phase ... (Advertisement and Sale Permit No. ...);

G AND WHEREAS the Vendor has agreed to sell and the Purchaser has agreed to purchase all that piece of land with vacant possession distinguished as *Plot/Lot No. ... and which is more particularly delineated and shaded RED in the Layout Plan measuring approximately ... square metres in area (hereinafter referred to as 'the said Lot' TOGETHER with a ... to be erected thereon (hereinafter referred to as 'the said Building') described in H the Vendor's plan as Type ... specified in the Second Schedule hereto, (and the said Lot and Building are hereinafter collectively referred to as 'the said Property'), subject to the terms and conditions hereinafter contained; NOW IT IS HEREBY AGREED as follows:

I 1. The Vendor hereby agrees to sell and the Purchaser agrees to purchase the said Property free from any agricultural or industrial conditions expressed or implied and any restrictions against the building of housing accommodation thereon and

all encumbrances other than those imposed by the provisions hereto/already subsisting at the date hereof (if any) and any conditions expressed or implied affecting the title."

[19] We are of the view that based on the provisions of law referred to above, the Act and Regulations cannot apply to the facts and the circumstances of this case. The facts showed that it was the plaintiffs who applied for the building lots from the Land Office, Ipoh. Letters from the Land Office, Ipoh as found in the Appeal Records showed that the plaintiffs were informed that their applications for the building lots were approved subject to certain conditions. We would refer to the letter from the Land Office, Ipoh which was addressed to the fourth plaintiff and it reads as follows:

Permohonan Tanah Untuk Tapak Rumah

Dalam Mukim Ulu Kinta PT ...

RPT. Ampang

Adalah dengan segala hormatnya berhubung dengan perkara di atas, memaklumkan bahawa permohonan tuan/puan telah diluluskan mengikut syarat-syarat dan perjanjian seperti berikut:

(a)	Jenis Milik	- Pajakan Mukim
(b)	Tempoh Pajakan	- 99 tahun
(c)	Premium	- RM600
(d)	Hasil Tahun Pertama	- RM120
(e)	Bayaran Ukur	-
(f)	Batu Sempadan	-
(g)	Deraf	- RM5
(h)	Bayaran Memperenggan	- RM150
(i)	Hakmilik Sementara dan Tetap Kos Pembangunan	- RM80

(j) Syarat-syarat tertentu

(i) Pemilik hendaklah di dalam tempoh (2) tahun daripada tarikh pengeluaran milik mendirikan sebuah bangunan mengikut pelan yang diluluskan oleh Majlis Bandaraya

dan hendaklah selepas itu menjaganya di dalam keadaan baik yang dapat memuaskan hati Pentadbir Tanah Kinta, Ipoh.

(ii) Pemilik akan membayar dan bertanggungjawab di atas segala cukai assessmen dan sebarang apa bayaran yang lain yang mungkin atau mesti dibayar atau dikenakan ke atasnya atau berkenaan tanah yang dengan ini diberimilik atau yang mungkin atau sebarang bahagian atau yang mungkin atau yang mesti dibayar atau dikenakan ke atasnya atau berkenaan sebarang bangunan yang ada pada masa ini didirikan di atas tanah itu samada dikenakan oleh sebuah Majlis Bandaraya, Majlis Bandaran, Lembaga Bandaran, Majlis Daerah atau sebarang penguasa lain yang sah di sisi undang-undang.

(l) Sekatan Milik - Tanah yang dengan ini diberimilik tidak boleh ditukar milik atau dipajak kecil atau dibebankan melainkan kepada orang atau orang-orang yang diberi kebenaran bertulis oleh Menteri Besar.

(m) Jenis Bangunan - Bangunan

2. Sekiranya tuan/puan bersetuju dengan syarat-syarat perjanjian di atas, tuan/puan adalah dijemput ke Pejabat Tanah, Ipoh pada ... jam 9.00 pagi untuk menerima Notis Genap Masa Hasil Dibayar (Borang 5A).

Kesemua pembayaran adalah berjumlah RM955 (Sembilan Ratus Lima Puluh Lima sahaja).

3. Kegagalan tuan/puan hadir pada tarikh yang ditetapkan akan mengakibatkan pembatalan tanah yang diluluskan.

[20] From the appeal records it also showed that a Form 5A as provided for under ss. 81 and 82 of the National Land Code 1965 was issued to the plaintiffs by the Land Office. Sections 81 and 82 provide as follows:

81. Items of land revenue payable on approval

(1) The following sums shall become due to the State Authority at the time when it approves the alienation of any land under this Act:

(a) the first year's rent payable in respect of the land, computed on the basis of the area approved, or provisionally approved, for alienation;

(b) the premium (if any) so payable, computed on the like basis;

(c) the amount, or estimated amount, of any survey fees chargeable in respect of the land where the land is to be surveyed by a Survey Officer; and

(d) the fees chargeable in connection with the preparation and registration of documents of qualified title and final documents of title thereto.

(2) As soon as may be after any sums have become due in respect of any land by virtue of subsection (1), the Land Administrator shall, by notice in Form 5A, require the intended proprietor to pay them to him within the time specified in that behalf in the notice; and if any such sum is not so paid within the specified time, the approval of the State Authority to the alienation thereupon lapse.

(3) So far as any other sums specified in subsection (1) are at the commencement of this Act outstanding in respect of any land approved for alienation under the provisions of any previous land law, the provisions of this section shall apply thereto as if the land had been approved for alienated immediately after that commencement:

Provided that no fee chargeable in connection with the preparation and registration of documents of qualified title shall be payable if the approval of the State Authority was given under the provisions of a previous land law to a person who, pursuant to the approval, was at the commencement of this Act lawfully in occupation of the land in expectation of title.

(4) For the purposes of this section, the provisions of subsections (1) and (2) of section 96 shall apply to the computation of rent.

82. Power to require payment of deposit

(1) The State Authority may if it thinks fit direct that no application for the alienation of land under this Act, or no application for the alienation thereunder of land of any class or description specified in the direction, shall be entertained unless and until there has been paid to the Land Administrator, by way of deposit, an amount estimated by him as the total amount which will be come due to the State Authority by virtue of subsection (1) of section 81 if the application is approved.

(2) On receiving any application to which any such direction applies, the Land Administrator shall, by notice in Form 5A, require the applicant to deposit the said amount within the time specified time in that behalf in the notice; and if the amount demanded is not so deposited within the specified time, the application shall thereupon be deemed to have been withdrawn.

[21] We would herein refer to the notice in Form 5A from the Land Office, Ipoh to the fourth plaintiff which reads as follows:

Tuan/Puan adalah dengan dikehendaki dalam tempoh tiga (3) bulan dari tarikh notis ini disampaikan supaya *membayar/memasukkan dalam deposit di Pejabat Tanah Daerah ini wang-wang yang berikut:

Cukai bagi tahun yang pertama	RM120
Premium	RM600
Bayaran Ukur (tidak termasuk Tanda Sempadan)	RM
Tanda Sempadan	RM
Penyediaan dan pendaftaran Suratan Hakmilik Tetap dan Sementara	RM 80
Jumlah	RM800

Adalah diberi notis bahawa jika jumlah wang tersebut di atas tidak dibayar/dimasukkan dalam deposit dengan sepenuhnya dalam tempoh yang dinyatakan itu, maka menurut kuasa peruntukan-peruntukan seksyen *81/82 Kanun Tanah Negara

*Kelulusan atau permohonan tuan/puan akan luput.

*Permohonan tuan/puan akan disifatkan sebagai telah ditarik balik.

[22] It is also to be noted the fact that document of qualified titles (corresponding to Land Office titles) relating to the building lots were issued to the plaintiffs in this case.

[23] It is our judgment from the facts disclosed above it would show that for all intent and purposes, the building lots which were originally State land were alienated to the respective plaintiffs. When the first agreement and the second agreement were entered into by the parties the documents of title to the building lots were yet to be issued to the plaintiffs. Upon the plaintiffs' applications, the building lots were alienated to them. The plaintiffs

consequently became the registered owners of the building lots. The defendant therefore was clearly not the proprietor/vendor of the building lots.

[24] We also find that the plaintiffs agreed to pay the costs of the development works carried out by the defendant as per the first agreement. The plaintiffs also agreed to engage the defendant to construct houses on their respective building lots under the second agreement. It was a term of the second agreement that the period of completion of the houses shall be two years from the date of the execution of the agreement. It is not disputed that there was a delay in the completion of the houses. In relation to this, cl. 13 of the second agreement stipulates that in the event of any delay to complete and hand over vacant possession, the defendant need only to pay damages of RM50 per month calculated from the date of completion to the date of actual delivery of vacant possession.

[25] It could be seen from the facts of this case that the basis of the complaint which led the plaintiffs to file this action was that they were not happy with the said cl. 13 of the second agreement. The plaintiffs wanted damages to be calculated as per cl. 22(2) of the form prescribed in Schedule G of the Regulations and not in the manner provided for under cl. 13 of the second agreement. It is clear that when the declarations sought for were granted by the court, the plaintiffs would be in a position to claim for more damages, *viz*, upon it being declared that the terms and conditions in the form prescribed in Schedule G as provided in reg. 11 of the Regulations shall apply in place of the first agreement and the second agreement. Clause 22(2) of the said form prescribed in Schedule G of the Regulations provides as follows:

> 22(2) If the Vendor fails to deliver vacant possession of the said Building in the manner stipulated in clause 23 herein within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Building. Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Building.

[26] It is our considered view that there is nothing to show that the defendant was a 'licensed housing developer' within the meaning of s. 3 of the Act. The Court of Appeal is right in its finding that the court is not empowered to grant such a declaration as sought for by the plaintiffs. Section 5 of the Act provides no housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a lincence issued under the Act. Such a licence can only be granted by the Controller of Housing as provided for under the Act and not by way of a declaration by the court. There are several conditions to be fulfilled before such a licence can be granted and s. 6 of the Act lay down the conditions or restrictions for the grant of such a licence. These conditions must be fulfilled before such a licence can be issued. We agree with the views expressed by the Court of Appeal that to grant such a declaration would tantamount to the court usurping the powers of the Controller of Housing under the Act. We are of the view if at all the defendant has breached the provisions of the Act in carrying out a housing development as a housing developer by not complying with the provisions of the Act then the defendant would be committing an offence under s. 18 of the Act. In this case there is nothing on record to show that the defendant has committed such an offence.

[27] We would also agree with the views expressed by the Court of Appeal that the fact that the defendant held itself out as a "housing developer" through advertisements in newspapers, brochures and flyers, etc., has no bearing upon the declaration sought for. On this point in the case of *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors.* [2001] 3 CLJ 864, in delivering the judgment of the Court of Appeal, Gopal Sri Ram, JCA summarized the matter of advertisements in this way (at p. 868):

> ... as a general rule, an advertisement is considered by courts to be not an offer but a mere invitation to treat, that is to say, an offer to make offers.

[28] To determine whether the defendant is in fact a housing developer within the meaning of the Act, we have to look into the terms of the agreement entered into by the defendant and the plaintiffs. Under the second agreement, the plaintiffs are the landowners. That being the position, we cannot see how the

second agreement, even if read together with the first agreement, can in law be replaced by the "statutory agreement' under Schedule G of the Regulations. It is clear from the terms of the said two agreements the development concept of the project was different from that undertaken by a licensed housing developer under the Act.

[29] Before us learned counsel for the plaintiffs again cited the cases of (1) *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 (2) *MK Retnam Holdings Sdn Bhd v. Bhagat Singh* [1985] 2 MLJ 212 and (3) *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Berhad* [1985] 1 MLJ 285, all of which had been referred to in arguments before the High Court and the Court of Appeal to show that the defendant is in fact a housing developer within the meaning of the Act. We wholly agree with the views expressed by the Court of Appeal that all these case authorities have no relevance to the facts in the instant appeal.

[30] It is not disputed in the two cases of *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* and *MK Retnam Holdings Sdn Bhd v. Baghat Singh (supra)* that the provisions of the Acts and the Rules were applicable to the parties when they entered into the sale and purchase agreement. In both cases, there was a sale and purchase agreement of land and building and the vendor was the owner of the land as well as a licenced housing developer within the contemplation of the Act as opposed to the instant case wherein the defendant was neither the owner of the building lots nor a licenced housing developer. Further, the first agreement and the second agreements were not sale and purchase agreements of land and building.

[31] In the case of *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Berhad (supra)*, again the facts of that case can be clearly distinguished from the facts in the instant appeal. In *City Investment Sdn Bhd*'s case the appellant was the registered owner of the land in question and had entered into two separate contracts with the respondents, a co-operative society of civil servants, for the sale of a small portion of the land to be developed. By the first contract the appellant agreed to sell to the respondents sixty specified building lots for the price of RM5,000 for each lot and to clear and level the lots for a development price of RM420,000 calculated at the rate of RM7,000 per lot. The

appellant also agreed to nominate a licensed housing developer who would build a terrace house on each lot in conformity with the plans and specifications annexed to the first contract for the construction price of RM840,000 calculated at the rate of RM14,000 for each house. The appellant later nominated themselves as the licensed housing developer for the first contract and submitted draft building contracts which was rejected by the respondents as it did not conform to the provisions of the Act and the rules made thereunder. The learned trial judge in *City Investment Sdn Bhd*'s case held that the first contract was a sale of land with houses and therefore caught by the Act and the rules made thereunder. The appellant's appeal to the Federal Court and subsequently to the Privy Council was dismissed. It was held by the Board that by the first contract and by the appellant's own nomination of themselves as developers, the appellants became engaged in the business of housing development by agreeing to construct more than four units of housing accommodation in one development with the view of selling the housing accommodation thus constructed. It was also held that the appellants were and remained the proprietors of the land until they transfer the building lots and that under the first contract and the nomination, the appellant became the housing developer under a contract to construct and sell sixty terrace houses to the respondents for the construction price.

[32] The facts in the instant appeal however, are clearly different, *viz.*, there were no sale and purchase agreements for the sale of the building lots. Even if the first agreement and the second agreement are read together the defendant can neither be treated as the vendor nor the registered owner of the building lots. SLSB also cannot be treated as the vendor or the registered owner of the said land prior to the assignment of the development works to the defendant. The Acts and the Regulations are clearly not applicable under the circumstances of this instant appeal.

Conclusion

[33] For the reasons above stated we would answer the two questions posed in this appeal in the negative. We would therefore dismiss this appeal with costs. We would also make an order that the deposit is to be paid to the respondent (defendant) on account of taxed costs.